

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Review of the Commission's )  
Regulations and Policies )  
Affecting Investment in )  
the Broadcast Industry )

MM Docket No. 92-51

To: The Commission

COMMENTS OF JONES SPACELINK OPPORTUNITIES, INC.

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## SUMMARY

Jones Spacelink Opportunities Inc. ("Spacelink") files these comments in response to the Commission's request in its Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-51, FCC 92-96 (April 1, 1992) for comment on the availability of financing mechanisms other than those discussed in the Notice which might be used effectively to increase and facilitate the investment of capital in media-related industries under Commission jurisdiction. In this regard, Spacelink requests that the Commission examine the application of its attribution rules to widely-held business trusts.

Although currently widely-held business trusts are not commonly utilized, they offer an alternative means of raising capital to acquire and operate media properties. In considering its attribution rules, the Commission has thus far not addressed widely-held public trusts as a vehicle for investment in media properties. Spacelink requests that Commission utilize the above-referenced proceeding to establish a regulatory framework for review of widely-held business trusts to determine the attributability of the beneficial ownership interests in such trusts.

Spacelink submits that, because privately-held trusts and widely-held business trusts differ in many material respects, the attribution criteria applicable to privately-held trusts should not be applied to widely-held

business trusts. The principal objectives of a widely-held business trust are to obtain capital appreciation in the value of its assets, to preserve and protect capital, and to obtain equity build-up. As a practical matter, such trusts are held by thousands of investors who have no inclination or ability to influence the management or operation of trust properties, regardless of whether they have the right to remove a managing trustee without cause.

For purposes of the Commission's analysis, widely-held business trusts should be defined as business trusts whose ownership shares are offered for sale to the general public and which are subject to the general reporting requirements of the Securities Exchange Act of 1934. The shares in such a trust should not be deemed attributable where the trust meets the following criteria:

- (1) the shares of the widely-held business trust have been offered for sale to the general public and are subject to informational reporting requirements under the Securities Exchange Act of 1934;
- (2) restrictions are placed on the sale of shares by beneficial owners, such as granting the managing trustee a right to approve or disapprove of such sales; and
- (3) all of the powers to manage and conduct the affairs of the trust are vested in the managing trustee.

Alternatively, if the Commission decides that the shares of widely-held business trusts are attributable, Spacelink believes that, because the shareholders in such trusts have less power to affect the management and control

of media properties than the shareholders of a corporation, the shares of such trusts should be subject to the attribution benchmarks adopted by the Commission for individual corporate shareholders.

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COMMENTS OF JONES SPACELINK OPPORTUNITIES, INC.

Jones Spacelink Opportunities, Inc. ("Spacelink") by its attorneys, submits its Comments in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry<sup>1/</sup> in the above-captioned proceeding. Spacelink takes this opportunity to respond to the Commission's request in its Notice for comment on whether there are financing mechanisms available other than those discussed in the Notice which might be used effectively to increase and facilitate the investment of capital. Although currently not in common use, the Commission should consider widely-held business trusts as an alternative financing vehicle through which to increase and facilitate the investment of capital in media-related industries under Commission jurisdiction.

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1/ Notice of Proposed Rulemaking and Notice of Inquiry, MM Docket No. 92-51, FCC 92-96 (April 1, 1992) ["Notice"].

### **INTRODUCTION**

Spacelink is the managing trustee of a business trust (the "Trust")<sup>2/</sup> established under the Delaware Business Trust Act to own and operate cable television systems and to acquire undeveloped cable television franchises.<sup>3/</sup> The Trust will also invest a portion of the proceeds from the sale of trust shares and borrowed funds in the acquisition, development, production and distribution of original entertainment programming, including the acquisition of rights to distribute programming produced by unaffiliated parties. Upon completion of its public offering of Trust shares, the Trust will be "widely-held."

Spacelink requests that the Commission utilize the current proceeding to establish a specific framework for review of widely-held business trusts to determine the attributability of beneficial ownership interests that are offered to the public. For purposes of the Commission's

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2/ Jones Spacelink Opportunities, Inc. is a subsidiary of Jones Spacelink, Ltd. Jones Spacelink, Ltd. is also the parent of Jones Intercable, Inc., which has filed joint comments in this proceeding with the A.H. Belo Corporation, Broad Street Television, Communications Equity Associates, Cosmos Broadcasting Corporation, Falcon Cable Systems Company, Multimedia Inc. and River City Broadcasting. Those comments are referred to herein as the "Joint Comments." It should be noted that Spacelink has previously requested the Commission staff to consider the attribution rules as applied to the structure of the Trust.

3/ Delaware Business Trust Act, 67 Del. Laws, c. 297, § 8 (1990). A copy of the Act is attached to these comments.

analysis, widely-held business trusts should be defined as business trusts whose ownership shares have been offered for sale to the general public and which are subject to the reporting requirements established under the Securities Exchange Act of 1934.<sup>4/</sup> As discussed below, although a widely-held business trust may have some characteristics which, if exhibited by a privately-held trust, would render the trust shares attributable under the Commission's attribution standards, widely-held business trusts differ in many material respects from privately-held trusts.

While from a technical standpoint the structure of a voting trust is dissimilar to that of widely-held limited partnerships and corporations, the underlying purposes of widely-held business trusts are identical to those of other financing vehicles that are the subject of the Commission's Notice. Both widely-held business trusts and widely-held limited partnerships can serve as vehicles through which thousands of investors have the opportunity to invest small amounts of capital for long-term capital appreciation. Moreover, the principal objectives of a widely-held business trust are generally identical to the objectives of widely-

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<sup>4/</sup> These reporting requirements include the filing of an Annual Report on Form 10-K, a Quarterly Report on Form 10-Q, and the report of certain important events on Form 8-K. Registered entities are required to file these reports as long as they have 500 record holders of equity securities and assets in excess of \$5,000,000.00.



held limited partnerships, i.e., to obtain capital appreciation in the value of its assets, to preserve and protect capital, and to obtain equity build-up.

Spacelink submits that, where a widely-held business trust meets the criteria discussed herein, the beneficial ownership interests in that trust should be non-attributable under the Commission's standards. Alternatively, if the Commission is unable to adopt such specific guidelines with respect to widely-held business trusts, the Commission should apply the attribution standards which it adopts in this proceeding for individual corporate shareholders.

#### **ATTRIBUTION BENCHMARKS FOR VOTING TRUSTS**

##### **1. Current Attribution Standard**

In its Attribution Order<sup>5/</sup> the Commission indicated that it would continue to accept voting trusts as legitimate insulation devices, judging their acceptability on a case-by-case basis. The Commission stated that a person holding or sharing the power to vote the assets of a

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5/ See Report and Order, MM Dockets Nos. 83-46, et. al, 97 FCC 2d 997 (1984), ["Attribution Order"], reconsideration, Memorandum Opinion and Order, 58 FCC 2d 604 (1985), further reconsideration, Memorandum Opinion and Order, 1 FCC Rcd 902 (1986) [collectively, "Attribution Proceedings"].

trust will have those assets attributable.<sup>6/</sup> The Commission also indicated that a beneficiary who holds the unrestricted power to replace a trustee or to revoke a trust will also have the assets of the trust attributable, unless that power is contingent upon an event beyond the beneficiaries control. The Commission found that the right to replace the trustee or to revoke the trust permits the holder of the right to substitute its judgment for the judgment of the trustee on issues involving the subject licensee.<sup>7/</sup> In its reconsideration of the Attribution Order, the Commission, in discussing limited partnerships, determined that the power of removal, even if it is contingent, as a practical matter affords the ability to control or influence the affairs of the licensee.<sup>8/</sup> As discussed below, the technical existence of these rights is a poor indicator of actual ability to influence or control the managing trustee of a widely-held business trust and should not form the basis of any determination regarding the attributability of trust shares.

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6/ Attribution Order, 97 FCC 2d at 1024.

7/ Id.

8/ See Memorandum Opinion and Order, 58 RR 2d at 616-17 n.51.

2. **Shares of Widely-Held Business Trusts  
Should Be Non-Attributable Where the  
Trust Satisfies Commission-Established  
Criteria**

Spacelink believes that the Commission's current standards for determining attributable beneficial ownership interests in voting trusts should not be indiscriminately applied to all types of voting trusts. Specifically, the current standards should not be applied to "widely-held business trusts."<sup>2/</sup> In adopting its voting trust attribution criteria in the Attribution Order, the Commission never addressed the specific issue of widely-held business trusts. Rather, the Commission generally focussed on issues and concerns which are more applicable to ownership interests in small, privately-held voting trusts with a small number of easily identifiable beneficiaries. The structure of a widely-held business trust dictates that beneficial ownership interests in such entities should be

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<sup>2/</sup> Widely-held public business trusts, consisting of a managing trustee and individual owners of beneficial interests (or "shareholders"), generally are large, nationwide voting trusts which typically offer the ownership interests (or "shares") for sale to the general public. As a result, the shareholders of a widely-held public business trust may often number in the thousands. Because shares in widely-held business trusts are considered securities, these trusts are subject to the reporting requirements established under the Securities Exchange Act of 1934.

non-attributable if they possess the following characteristics:

- (1) the shares of the widely-held business trust have been offered for sale to the general public and are subject to informational reporting requirements under the Securities Exchange Act of 1934;
- (2) restrictions are placed on the sale of shares by beneficial owners, such as granting the managing trustee a right to approve or disapprove of such sales; and
- (3) all of the powers to manage and conduct the affairs of the trust are vested in the managing trustee.

Widely-held business trusts are clearly distinct from other types of voting trusts with respect to the extent to which shareholders may exercise influence and control. Such distinctions are central to the concerns reflected in the Commission's Attribution Proceedings. The ownership shares of widely-held business trusts are subject to the information reporting requirements of the Securities Exchange Act of 1934 and are sold to individual investors through public offerings which are conducted on a nationwide basis. A typical widely-held business trust thus has literally thousands of individual shareholders.

Generally, the instrument establishing a widely-held business trust prohibits shareholders from exercising influence or control over the day-to-day affairs or policy decisions of the trust. These shareholders are incapable of exercising influence over the trust through the sale of

trust shares because generally there is no secondary public market for the shares of widely-held business trusts and generally the managing trustee must approve the sale of any shares. Consequently, in most cases, shareholders are likely to hold their shares until the objectives of the trust have been met. Thus, as a practical matter, it is unlikely that any investor would purchase a potentially "influential" percentage of the trust shares because such an investor would have no control over the trust and no market in which to later sell the shares.

Smaller privately-held voting trusts may be created for investment purposes but may also provide shareholders with the ability to affect the management of the trust, as the Commission recognized in its Attribution Order.<sup>10/</sup> The shareholders of a widely-held business trust, however, typically purchase their trust shares for investment purposes only, and generally have no interest in becoming involved in the trust's day-to-day affairs.<sup>11/</sup> In fact, most widely-held business trust instruments contain a provision which prohibits shareholders from influencing or controlling the managing trustee concerning the day-to-day

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10/ Attribution Order, 97 FCC 2d at 1023-24.

11/ In this regard, the shareholders of a widely-held business trust are very similar to the limited partners of a widely-held limited partnership. See Joint Comments at 19-20.

management and operation of trust business. Other trust provisions can also guard against control or influence of the managing trustee. For example, a trust instrument may prohibit shareholders from being employed as independent contractors or agents for the trust, taking part in the transaction of any business for the trust, or from signing for or binding the trust in any manner.

Although a widely-held business trust instrument may give shareholders the right to ratify the decision of the managing trustee to sell the trust's assets, the actual decision to sell any assets generally remains within the managing trustee's control. The shareholders' voting right is not one of initiation, but merely one of ratification of the managing trustee's decision to sell trust assets. Thus, although the shareholders have a right that is associated with the sale of trust assets, the ability of shareholders to use this right to influence a managing trustee is truly de minimis.

In many ways, widely-held business trusts are closely analogous to large publicly-traded corporations. Such voting trusts offer shares for sale to the public just as a public company offers its stock for sale to the public. Just as a large publicly-held corporation has literally thousands of shareholders owning very small amounts of stock, widely-held business trusts also typically have

thousands of shareholders. Like minority corporate shareholders, the shareholders of widely-held business trusts generally purchase an interest in the trust for investment purposes only and have no interest in and do not seek active involvement in the trust's operations.<sup>12/</sup> In fact, in making their long-term capital investment, these investors depend upon the managing trustee's independence and ability to fulfill its fiduciary obligations.

As with individual minority corporate shareholders, the nature and size of a shareholder's ownership interest in a widely-held business trust, coupled with the large number of shareholders, ensure that no single shareholder can have an impact on the trust's operations and management. Indeed, such a shareholder's interest, like a public limited partner's interest, gives it even less control and influence over the voting trust's management and operations than a minority stockholder's control over a corporation. For example, for corporate minority stockholders, the annual meeting is the primary forum for

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<sup>12/</sup> To a large degree, the beneficiaries of these voting trusts hold rights which are equivalent to non-voting rights. The beneficiaries do not have the right to direct or control the management of the business of the trust, or conduct or transact any business for the trust. Similarly, non-voting stock by its specific nature precludes the means to influence or control the activities of the issuing corporation, and this relationship is knowingly and intentionally entered into by the corporation and the stockholder. KKK Associates, L.P., 2 FCC Rcd 7104, 7105 (1987).

exercising voting power over the corporation's management and policies. As is generally the case with widely-held limited partnerships, widely-held business trusts offer no comparable forum.

There is likewise a marked difference between a corporate stockholder's power to vote out a board of directors, the corporation's governing entity, and the trust shareholder's ability to vote out the trust's governing entity, the managing trustee. As indicated above, in its Attribution Order, the Commission determined that the right to replace the trustee or to revoke the trust permits the holder of the right to substitute its judgment for the judgment of the trustee.<sup>13/</sup> As a practical matter, however, while shareholders of widely-held business trusts can generally vote to dissolve the trust or to remove the managing trustee with or without cause, there are considerable practical restraints on their exercise of these powers. Any such vote for removal or dissolution would require one of the shareholders to organize and direct a voting coalition of shareholders. In order to accomplish this, the shareholder would be required to ascertain the identities of the other investors, convince them that the managing trustee should be removed, or that the trust should be dissolved, and then orchestrate the vote. These

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<sup>13/</sup> Attribution Order, 97 FCC 2d at 1024.



activities would be both time consuming and expensive, with the probable result that the typical small investor in a widely-held business trust would be unwilling and unable to initiate any such process absent extreme circumstances.

In many cases, shareholders are granted the power of removal because it is mandated by state law.

Shareholders in widely-held business trusts would generally not ask for the power to remove a managing trustee, and, as indicated above, the power that they are granted is essentially void of meaning because as a practical matter they are both unwilling and unable to exercise it.

In sum, these considerations indicate that the shareholders of widely-held business trusts are not at all likely to attempt to dissolve the trust or vote out the managing trustee as a means of influencing or controlling the managing trustee. As a practical matter, the only circumstance which could give rise to a sufficient consensus among the shareholders to vote out the managing trustee would be the extremely poor performance of the voting trust. In order to provide for the continued management of the trust, the shareholders would have to find another party who was willing to purchase the managing trustee's ownership interest and undertake the management of an investment that had been performing very poorly in the eyes of the shareholders. Under such circumstances, it is improbable

that the shareholders of a widely-held business trust would or could attempt to influence the management of the voting trust by threatening to remove the managing trustee and finding another party willing to undertake management of the voting trust. Indeed, this type of action by the shareholders would only be likely if the managing trustee were to act in a grossly improper or illegal manner in violation of its fiduciary duties. Such situations are unlikely to occur on any regular basis, and when they do occur, the shareholders' exercise of their removal power would not contravene the policies underlying the Commission's attribution standards.

In comparison to the right of shareholders of widely-held business trusts to vote out the managing trustee, a corporate stockholder's exercise of the power to vote out a board of directors is not nearly as restricted. The removal of a director from a board of directors of a corporation necessitates neither a substantial financial investment nor involvement in the day-to-day management of the company which is beyond the ability of an individual or groups of shareholders.

3. If Shares of Widely-Held Business Trusts Are Deemed Attributable the Shares Should be Subject to the Attribution Standard Adopted by the Commission for Individual Corporate Shareholders

If the Commission determines that the shares in widely-held business trusts are attributable, then it should apply the attribution standards that it adopts in this proceeding for individual corporate shareholders. In the Attribution Order, the Commission discussed several typical powers held by trust shareholders the existence of which would result in the application of the appropriate attribution benchmark.<sup>14/</sup> The language of the Attribution Order, however, does not make it clear whether the applicable benchmark in such cases would be the benchmark for individual corporate shareholders or some other benchmark.

As illustrated in the discussion above, widely-held business trusts and corporations possess many material similarities which must be considered in the analysis of appropriate attribution benchmarks.<sup>15/</sup> For example, because

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<sup>14/</sup> For example, the Commission indicated that the power to vote the assets of a trust or the unrestricted power to remove the trustee would result in a finding of attributability. Attribution Order, 97 FCC 2d at 1024.

<sup>15/</sup> As illustrated in the Joint Comments, many of the similarities between widely-held business trusts and corporations are also applicable to the analysis of widely-held limited partnerships for attribution purposes. Joint Comments at 19-23.

of the widespread ownership of these financing vehicles among thousands of investors, trust shareholders, similar to individual corporate shareholders, do not have the practical ability to affect the day-to-day management and operations of the trust. Consequently, the attribution standards applicable to corporate shareholders are also appropriate in the context of widely-held business trusts and should be applied by the Commission if it determines that shares in widely-held business trusts are attributable.

#### **CONCLUSION**

Spacelink endorses the Commission's proposals to modify its attribution standards as discussed in the Notice. Spacelink requests that the Commission take this opportunity to establish a specific framework for review of widely-held business trusts to determine the attributability of beneficial ownership interests which are offered to the public. Spacelink submits that beneficial ownership interests in a widely-held business trust should be non-attributable if the trust satisfies the criteria discussed herein.

If the Commission is unable to adopt such specific guidelines with respect to widely-held business trusts, the Commission should apply the attribution standards which it

adopts in this proceeding for individual corporate shareholders.

Respectfully submitted,

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